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Filing date: **12/30/2005**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91160119
Party	Plaintiff Quad Int'L, Incorporated
Correspondence Address	Laura Fernandez Buchanan Ingersoll, P.C. 100 Southeast Second Street, Suite 2100 Miami, FL 33131
Submission	Response to Board Order/Inquiry
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Date	12/30/2005
Attachments	PDF_response_to_order_to_show_cause.PDF (6 pages)

2. Applicant waited until almost the last minute and mailed her Reply to the Board on December 21, 2005.¹ This Reply, however, does not show good cause why judgment should not be entered against her.

3. The Board's show cause order was prompted by the fact that judgment had already been entered against the Applicant in another opposition, Opposition No. 91161452 (the "Anderson Opposition"), regarding the very same application at issue in this opposition. In the Anderson Opposition, the Opposer filed a Motion for Judgment on the Pleadings on or about March 23, 2005. The Applicant failed to submit a timely response in opposition to this motion and judgment was ultimately entered against Applicant in that case in August of 2005.

4. In her Reply, Applicant attempts to shift blame for the failure to file a response to the Motion for Judgment on the Pleadings on her attorney, Michael Painter. Curiously, however, Mr. Painter is only alleged to have failed in his responsibilities in the Anderson Opposition. Indeed, less than a month *after* the dispositive motion was filed in the Anderson Opposition, Opposer filed a Motion for Summary Judgment in this case. Thereafter, Mr. Painter responded to Opposer's motion and filed a cross-motion for summary judgment on behalf of Applicant, but, inexplicably, failed to submit any response to the previously filed Motion for Judgment on the Pleadings in the Anderson Opposition. In the interim, however, Mr. Painter and Applicant obviously communicated in order to prepare and execute Applicant's May 3, 2005, Declaration in opposition to Opposer's motion for summary judgment. Mr. Painter was clearly providing services to Applicant in this case during the time he is now conveniently accused of "gross negligence." It is inconceivable that during that time period, and while coordinating with Mr. Painter on matters related to this case, Applicant did not discuss (or at the very least, become aware of) the pending dispositive motion in the Anderson Opposition.

¹ As of the date of this filing, the Reply still does not appear on the Board's on-line records (TTABVUE).

5. Applicant's Reply inexplicably fails to address this disparity. In fact, Applicant herself failed to submit a Declaration on her own behalf. Nor has Applicant elicited a Declaration from Mr. Painter explaining the reason for the lack of response in the Anderson Opposition. Instead, the Reply is limited to the efforts that Applicant's new counsel undertook *after she was retained in September*. There is no sworn explanation whatsoever as to what Applicant herself did in the seventh months between March and when new counsel was retained in September.

6. Moreover, although Applicant claims that "upon independent discovery" she realized that judgment was entered against her in the Anderson Opposition, she does not specify *when* she discovered this fact. Therefore, this Board has no basis to determine whether she acted diligently in her efforts.

6. As set forth in *Gaylord Entertainment Co. v. Calvin Gilmore Productions Inc.*, 59 U.S.P.Q.2d 1369, 1372 (T.T.A.B. Apr. 25, 2000), both "the client and attorney share duty to remain diligent in prosecuting or defending client's case." In her Reply, the Applicant fails to establish that she adequately discharged her duty. "[C]ommunication between client and attorney is two-way affair; and . . . action, inaction, or even neglect by client's chosen attorney will not excuse inattention of the client so as to yield the client another day in court." *Gaylord*, 59 U.S.P.Q.2d at 1372. Applicant should not be permitted to escape the consequences of her failure to maintain adequate communications with her counsel. *Id.* at 1373.

7. It is also important to note that, according to her Complaint to the State Bar of California, Applicant claims to have employed and paid Mr. Painter through September, 2005. Again, there is no explanation as to why Mr. Painter remained employed by Applicant, or why

Applicant continued to pay him for months after he allegedly "severely failed in the performance of his duties."

8. As the case cited by Applicant herself warns, a party who voluntarily chooses an attorney as its representative in the action, "cannot now avoid the consequences of the acts or omissions of this freely selected agent." *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 397 (1993); *see also United States v. 8136 S. Dobson St.*, 125 F.3d 1076, 1083-84 (7th Cir. 1997) ("Rule 60(b) is not the remedy for attorney negligence or incompetence Malpractice, gross or otherwise, may be a good reason to recover from the lawyer but does not justify prolonging litigation against the original adversary.")

9. Finally, the Reply does not sufficiently explain why three months after new counsel was allegedly retained, she still has not acted to vacate the judgment. To date, new counsel has not filed a motion for reconsideration or a Notice of Appeal in the Anderson Opposition. In fact, new counsel has not, as of the date of this Response, entered an appearance in that action. Furthermore, contrary to Applicant's assertions, there is no protective order in place in the Anderson Opposition. Such orders are easily ascertainable as all of the filings are public record and Applicant's new counsel had full access to all filings through the TTABVUE website. Given all the publicly available information, and the Applicant's own personal knowledge, new counsel certainly could have submitted a proper motion to attempt to set aside the judgment. In addition, Ms. McLaughlin's Declaration fails to specify specific portions of the files that she required which were allegedly in the exclusive possession of Mr. Painter. Indeed, if the files were so urgently needed, Applicant should have filed an action against Mr. Painter sooner, or, at the very least, advised this Board of her plight. Applicant did neither.

10. As of the date of this Response, Applicant has not submitted anything in the Anderson Opposition. Even the “Objection” filed by Mr. Anderson back in November (two months after new counsel was retained) remains unanswered. It must be emphasized that it was only in response to the Board’s Order to Show Cause in this action that Applicant mentioned for the first time that she would be taking some form of action to be relieved from the judgment in the Anderson Opposition.

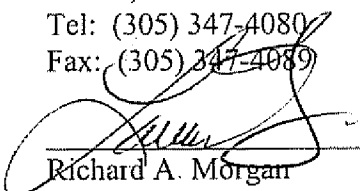
11. Clearly, Applicant is using this opposition in order to take avail herself to yet another bite at the apple in the Anderson Opposition. Given her unexcused delay and her inattention to the prosecution of her case, this should not be permitted.

12. Based on the foregoing, Applicant has not demonstrated excusable neglect in the Anderson Opposition nor shown good cause to avoid a judgment in this action. Applicant cannot hide behind the alleged negligence of her former counsel. Applicant, herself, (and now her new counsel as well) simply failed to act with diligence. Quad should not be forced to have this litigation delayed any further by Applicant’s conduct (or rather, lack thereof).

13. Having failed to show good cause, judgment should be entered against Applicant in this case and the challenged application should remain abandoned.

Respectfully submitted,

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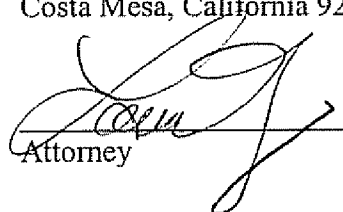


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 30th day of December, 2005,
by mailing by first class mail, postage prepaid, on the attorney named below:

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